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Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

TIMOTHY BOYKIN,
Petitioner,

v.

NORMAN MINETA.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TIMOTHY BOYKIN,	)	
Plaintiff,	)	
v.	)	Civil Action 03-477-A
NORMAN MINETA, Secretary, Department of Transportation,	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment. Plaintiff brings this action for unlawful disability discrimination under the Rehabilitation Act, 42 U.S.C. Section 200e et seq. (1994 & Supp. 2003).

Plaintiff began his employment with the Federal Aviation Administration ("FAA") on December 13, 1981, as an air traffic control specialist. On April 26, 1987, Plaintiff began working as an air traffic control specialist at the Washington Air Route Traffic Control Center ("Washington Center") in Leesburg, Virginia.

On March 24, 1988, Plaintiff was arrested and charged with reckless driving, driving under the influence, and possession of drug paraphernalia. Plaintiff subsequently pled

guilty and was convicted of driving under the influence. As a result of this charge, Plaintiff was referred to the Employee Assistance Program ("EAP") for substance abuse counseling on April 3, 1988, and was required to submit to a drug test pursuant to the Department of Transportation's "reasonable suspicion" policy on April 6, 1988. Joyce Sexton, the Washington Center's Air Traffic Manager at the time, proposed Plaintiff's termination from employment on June 2, 1988, and later rescinded this proposal on October 3, 1988.

Plaintiff contacted an EEO counselor on February 9, 1989, and alleged that he had been removed from air traffic control duties for a period of time following his arrest. Plaintiff did not mention his referral to EAP, the mandatory drug test, or the proposed termination notice at this time. Plaintiff's final counseling interview was on April 15, 1989, and Plaintiff filed a formal complaint against the FAA on April 17, 1989, alleging that he was discriminated against in being removed from air traffic control duties. The FAA rejected Plaintiff's administrative complaint because he had previously initiated a union grievance. On October 13, 1989, the EEOC's Office of Federal Operations ("OFO') affirmed the FAA's decision to reject the complaint, and on May 4, 1990, the OFO dismissed Plaintiff's request to reconsider. Plaintiff did not file a civil complaint in federal court within ninety days of May 4, 1990.

In November 1992, Sabra Kaulia became the Air Traffic Manager at the Washington Center. At this time, Ricardo Short was Plaintiff's first-line supervisor. On March 3, 1993, Plaintiff was responsible for controlling an air space geographically near the Raleigh-Durham Airport in North Carolina. Specifically, Plaintiff was responsible for aircraft flying at an altitude of greater than 11,000 feet. Plaintiff accepted control of three military aircraft bearing the codes RAVEN22, PETRO23, and PETRO24, that had just taken off from a North Carolina air base. RAVEN22 was the lead aircraft of the planes, which were

flying in formation, and served as the main communicator with Plaintiff. After Plaintiff took control of these aircraft, they penetrated the airspace controlled by Raleigh Approach at levels under 9,400 feet. Plaintiff did not inform Raleigh Approach that the aircraft were now traveling through its airspace.

In the next few minutes, Plaintiff repeatedly asked RAVEN22 to state the altitude of its lower-flying aircraft. Each time, RAVEN22 stated that the aircraft were flying below 10,000 feet. Another controller then asked Plaintiff to switch control of RAVEN22 to him. Plaintiff again asked RAVEN22 for its altitude, and RAVEN22 responded with an altitude of 9,500 feet. Plaintiff next requested that RAVEN22 direct its lowest-flying aircraft to climb through 11,000 feet. When RAVFEN22 flew through 11,000 feet, Plaintiff switched control of RAVEN22 to another controller. During this incident, RAVEN22 had traversed Raleigh Approach's airspace for over sixteen miles and Plaintiff never informed Raleigh Approach of RAVEN22's existence.

As a result of Plaintiff's delay transferring control of RAVEN22, an operational error, occurred between RAVEN22 and another aircraft in the area at that time. When RAVEN22 entered Raleigh Approach's airspace without knowledge, an operational deviation occurred. Under FAA procedures, a review board investigated the operational deviation. During the investigation, Plaintiff initially informed the review board that an operational deviation had not occurred. When confronted with the physical evidence, Plaintiff then acknowledged that the deviation had occurred.

Based on this evidence, Short determined that Plaintiff knew that the operational deviation was occurring at the time and did nothing to protect the aircraft. Short believed that Plaintiff attempted to prevent others from learning that the deviation had occurred. Short concluded that Plaintiff's initial statement to the review board that he did not have an operational

deviation was false. Short believed some form of discipline was appropriate, and as required by procedure Kaulia was required to approve any disciplinary actions recommended by Short, as well as all operational errors and deviations. Kaulia initially believed Plaintiff should be terminated for his actions, but after discussing the proposal with FAA's Eastern Regional Office and based upon Short's recommendation from April 9, 1993, and Plaintiff's subsequent May 4, 1993 reply, Ms. approved a ten-day suspension. Plaintiff was informed on July 7, 1993, that he would be given a ten-day suspension effective July 20, 1993 through July 31, 1993.

Plaintiff sought EEO counseling on April 5, 1993. On August 3, 1993, Plaintiff filed an administrative complaint against the FAA alleging that various actions dating back to 1988 were motivated by the erroneous belief that he was a substance abuser. The FAA denied the majority of Plaintiff's complaint as untimely, but accepted Plaintiff's allegation that his suspension was based on disability discrimination. Plaintiff appealed the denial of the remaining allegations, and the OFO affirmed the agency's denial of those allegations not arising from the March 1993 incident. Plaintiff received a full hearing on the ten-day suspension before an EEOC administrative judge on May 4, 1998. In an August 24, 1998 opinion, the administrative judge found no discrimination by Short or Kaulia. The FAA adopted this decision on August 31, 1998, and the OFO affirmed on February 21, 2002. Plaintiff subsequently brought this action.

Rule 56 (c) of the Federal Rules of Civil Procedure states that: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). The plain language of Rule 56(c) mandates

the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment must be granted. See id. at 249-50.

To establish a prima facie case for disability discrimination, Plaintiff must prove that: (1) he has a disability; (2) that he is a qualified individual for the employment in question; and (3) that his employer took adverse employment action against him because of his disability. EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000). An adverse employment action "includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (internal citation omitted).

Plaintiff first alleges disability discrimination based upon his referral to EAP, his mandatory drug testing, and his proposed and later rescinded termination in 1988. Prior to bringing a civil complaint, federal employees must first exhaust their administrative remedies. Brown v. GSA, 425 U.S. 820, 832-33 (1976). At the time of these events, an aggrieved employee was required to contact an EEO counselor within thirty days of the alleged discriminatory event. See 29 C.F.R. Section 1613.214(a)(1)(i) (1988). If the counseling session is unsuccessful, and employee was required to file a formal complaint with the agency within fifteen days of receiving notice to do so. Id. Section 1613.214(a)(1)(ii). Plaintiff was referred to EAP on April 3, 1988; he took a drug test on April 6,

1988; and Ms. Sexton proposed his termination on June 2, 1988, and rescinded her proposal on October 3, 1988. Plaintiff, however, did not seek EEO counseling until February 9, 1989, and then did not include these actions in his complaint, which was later dismissed. Plaintiff did not file a civil complaint within thirty days of the OFO's final denial on May 4, 1990, and thus these claims are barred.

Plaintiff next alleges that in September 1990, the FAA Area Manager told Plaintiff's first level supervisors to routinely give specific and direct instructions on how to perform his air traffic control duties and to discipline Plaintiff for failure to comply with these orders. There is no evidence that Plaintiff sought EEO counseling with respect to this allegation. Plaintiff never filed an administrative complaint with the FAA alleging that this directive constituted unlawful discrimination. Plaintiff also states that on December 21, 1992, two members of FAA's supervisory staff falsely accused him of violating FAA procedures. Plaintiff sought informal counseling on January 13, 1993, but did not visit an EEO counselor or file an administrative complaint within fifteen days of counseling. 29 C.F.R. Section 1613.214(a)(1)(ii) (1992)). Because Plaintiff did not exhaust his administrative remedies, Defendant is entitled to summary judgment on these allegations.

Plaintiff finally alleges that his ten-day suspension was the result of FAA management's perception that he was a substance abuser and claims both disability discrimination and retaliation. If a defendant provides a legitimate, non-discriminatory reason for an adverse employment action, the burden shifts to the plaintiff to demonstrate that the reason is mere pretest for discrimination. Reeves v. Sanderson Plumbing Prod., 520 U.S. 133, 142-43 (2000). The evidence is clear that Plaintiff was suspended for the operational deviation that occurred on March 3, 1993, and instead of taking immediate action to address the safety situation, Plaintiff attempted to

cover up the initial problem. Plaintiff also complains that his ten-day suspension was based on retaliation for his resort to the EEO process in January 1993. However, Plaintiff did not file his administrative complaint concerning the suspension until August 1993, and then did not allege retaliation for protected activity until 1998 during the administrative hearing. Because Plaintiff did not exhaust his administrative remedies regarding retaliation, and because Plaintiff was suspended for a legitimate, non-discriminatory reason, Defendant is entitled to summary judgment on these claims.

For the reasons stated above, Defendant's Motion for Summary Judgment should be granted.

An appropriate order shall issue.

s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 29, 2003